No. 05-1533

IN THE

Supreme Court of the United States

GIFFORD BROTHERS SAND AND GRAVEL, INC.,

Petitioner,

v.

ZONING BOARD OF APPEALS OF BARNSTABLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS APPEALS COURT

RESPONDENT, TOWN OF BARNSTABLE'S SUPPLEMENTAL RESPONSE

ROBERT D. SMITH, Town Attorney
Counsel of Record

T. DAVID HOUGHTON
First Assistant Town Attorney

CHARLES S. McLAUGHLIN, Jr.
Assistant Town Attorney

RUTH J. WEIL
Trial Counsel

TOWN OF BARNSTABLE
367 Main Street, New Town Hall
Hyannis, Ma. 02601-3907
508-862-4620; 508-862-4724 Fax

July 2006

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

INTRODUCTION

The gravamen of Petitioner's case is that the Town's 1929 by-law is illegal and, if not, then the 1929 by-law effects an inverse condemnation of Petitioner's property. Parties are obliged to alert this Court to new factual matters that could significantly impact potential rulings on the merits of the case. A factual development that directly affects the inverse condemnation argument has just occurred, is highly relevant to the analysis of this action, and is discussed below.

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner has argued that the physical condition of locus is such that mining is the only use to which locus can be put and if mining is ruled illegal, the property is effectively rendered worthless. Petitioner claims that this amounts to inverse condemnation.

Thus, it was with heightened interest that on Thursday, July 13, 2006 Counsel of Record attended a meeting with a local real estate developer and his counsel to which Counsel of Record had been recently invited (see affidavit, R. App. F). The expressed purpose of the meeting was for the developer and his counsel to receive informal input from the Town's Legal and Growth Management Departments regarding potential development of the very locus that is the subject of this action. Under discussion was a proposal to create a so-called "40B project" of ninety-three (93) units of single and multi-family housing under the Commonwealth's super-zoning statute that encourages affordable housing[1]. Any such plan would

---

[1]. Massachusetts General Laws, Chapter 40B, Section 21, *et seq.* The statute's purpose is to streamline the application process. Its administrative appellate process provides for an accelerated

initially be reviewed by the Town's Zoning Board of Appeals, the Respondent herein.

Presented as part of this presentation was a seventeen page portfolio of plans (R. App. G)[2] showing locus and bearing the date of June 23, 2006. The plans list one Christopher Keyes as the person for whom the plans were prepared. Keyes is the principal of the corporate petitioner in this action, (R. App. F).

ADDITIONAL REASON TO DENY THE PETITION

On the basis of the plan of development for locus presented for initial discussion (R. App. G), it would appear that Petitioner's argument relating to inverse condemnation is either a bit overstated or premature. How Petitioner can argue that it has no ability to use its land except for illegal mining and simultaneously pursue a potential ninety-three unit housing development gives pause, to say the least.

The consequences of this approach should pose less of dilemma for this Court. Apparently by its own hand, Petitioner has demonstrated that its land is not as barren, wasted, and valueless as it has argued. To the contrary, the potential for development and infusion of value is very real.

---

review and rejection of locally imposed conditions that render a project uneconomical. It is an ideal tool to assist municipalities in meeting state-mandated affordable housing goals and to overcome local NIMBY (not-in-my-back-yard) opposition. It is one of the many resources available to an enlightened property owner who desires to develop his property in the face of strong opposition.

[2] The cover and second page of the plans are reproduced here as Appendix G. The cover page shows the outline of locus with the proposed sites for housing units. The second page shows an artist's rendering of the proposed structures. The remaining fifteen pages show construction details not relevant to the argument presented here and are therefore not reproduced.

Petitioner's inverse condemnation argument is thus exposed as both disingenuous and apparently irrelevant.

Respectfully submitted,

ROBERT D. SMITH, Town Attorney
Counsel of Record

T. DAVID HOUGHTON
First Assistant Town Attorney

CHARLES S. McLAUGHLIN, Jr.
Assistant Town Attorney

RUTH J. WEIL
Trial Counsel

TOWN OF BARNSTABLE
367 Main Street, New Town Hall
Hyannis, Ma. 02601-3907
508-862-4620; 508-862-4724 Fax

July 2006

APPENDIX F – AFFIDAVIT OF CHARLES S. McLAUGHLIN, JR., ESQ. DATED JULY 17, 2006

AFFIDAVIT OF CHARLES S. McLAUGHLIN, JR.

I, Charles S. McLaughlin, Jr., state the following to the best of my personal knowledge and belief:

1. I have been a member of the Bar of the Commonwealth of Massachusetts for thirty-two years. I serve as assistant town attorney for the Town of Barnstable, the Respondent herein.

2. On Thursday, July 12, 2006, I was invited to a presentation at my office to be given by Attorney Michael J. Princi and his client, Douglas Lebel, a local real estate developer. Also in attendance were Counsel of Record, Town Attorney Robert D. Smith, and former assistant town attorney and trial counsel in this matter, Ruth D. Weil. Ms. Weil now serves as Director of the Town of Barnstable's Growth Management Department.

3. Attorney Princi and Mr. Lebel explained that Mr. Lebel was present to explore the Town's reaction to a tentative proposal to develop ninety-three units of housing, of which at least 25% would be "affordable", on the property that is the subject of this action. The proposal would be processed under Chapter 40 B of the General Laws of the Commonwealth of Massachusetts.

4. Mr. Lebel indicated that he had been in discussions with Mr. Christopher Keyes[1] concerning his possible purchase of locus and/or joint development of locus. Mr. Lebel did not reveal how long these discussions had been on-going or his legal relationship, if any, with either Mr. Keyes or Gifford Brothers Sand and Gravel, Inc.

5. Mr. Lebel presented what he described as "very preliminary" plans for the development of locus. The plans totaled seventeen pages. The first two pages are reproduced in Appendix G to Respondent's Supplemental Response. The first page of the Plans is a site plan of locus showing possible locations of forty-five single housing units and forty-eight multi-family units. It contains the notations, "Prepared for CHRISTOPHER KEYES" and "DATE: June 23, 2006". The second page displays what Mr. Lebel described as an artist's rendering of the elevations of the proposed structures. The remaining fifteen pages consisted of floor plans and construction details and are not reproduced in the Record.

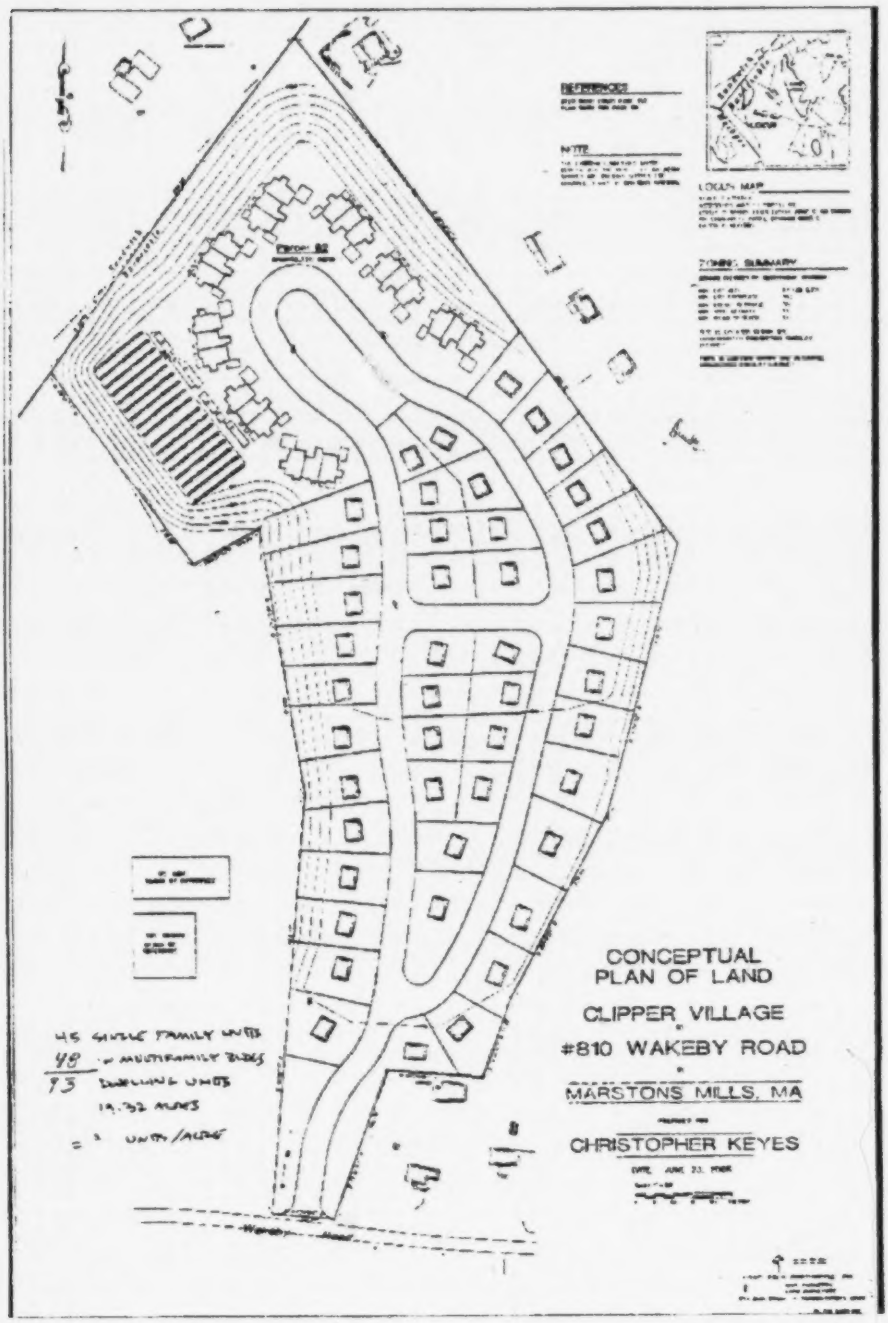
Signed under the pains and penalties of perjury at Barnstable, Massachusetts this 17th day of July 2006.

/s/ Charles S. McLaughlin, Jr.
Charles S. McLaughlin, Jr.

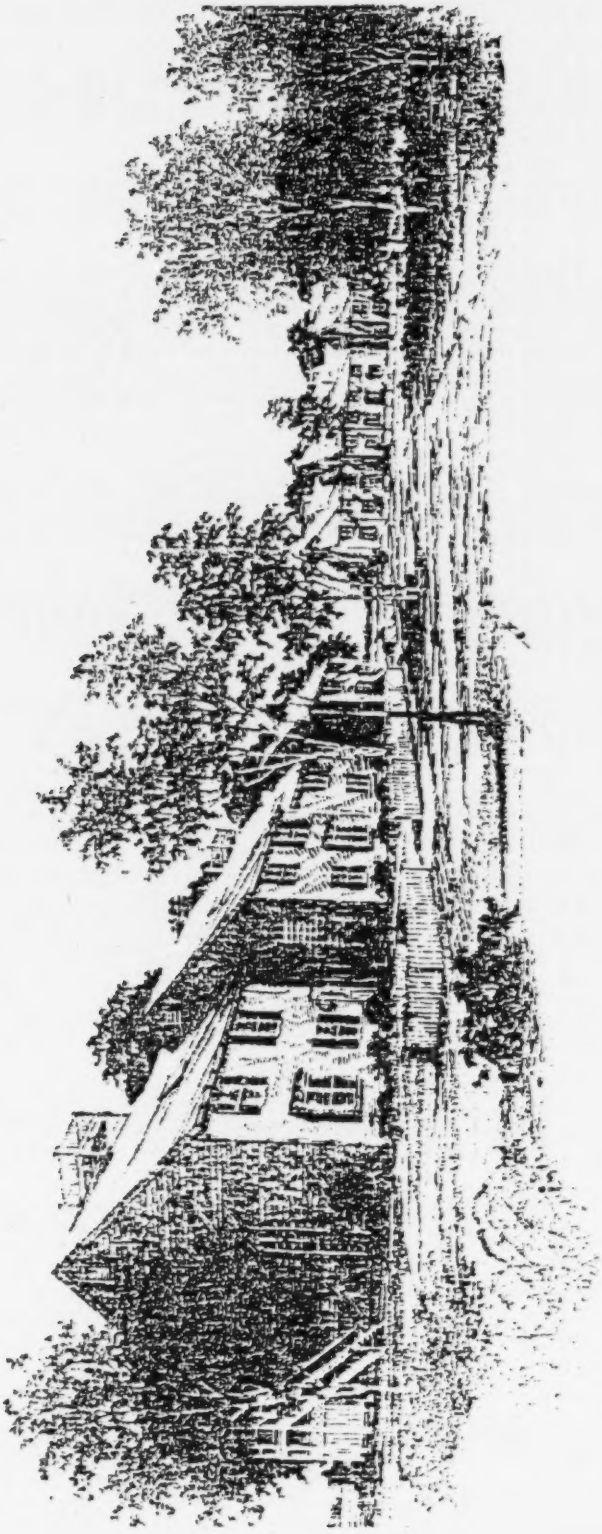
---

[1] An on-line examination of corporate records at the Massachusetts Secretary of State's office indicates that Christopher Keyes is President of Gifford Brothers Sand and Gravel, Inc., the Petitioner in this matter.

APPENDIX G



BEST AVAILABLE COPY



APPENDIX H

MASSACHUSETTS GENERAL LAWS

CHAPTER 40B. REGIONAL PLANNING

LOW AND MODERATE INCOME HOUSING

Chapter 40B: Section 21. Low or moderate income housing; applications for approval of proposed construction; hearing; appeal

Section 21. Any public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing may submit to the board of appeals, established under section twelve of chapter forty A, a single application to build such housing in lieu of separate applications to the applicable local boards. The board of appeals shall forthwith notify each such local board, as applicable, of the filing of such application by sending a copy thereof to such local boards for their recommendations and shall, within thirty days of the receipt of such application, hold a public hearing on the same. The board of appeals shall request the appearance at said hearing of such representatives of said local boards as are deemed necessary or helpful in making its decision upon such application and shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section. The board of appeals, in making its decision on said application, shall take into consideration the recommendations of the local boards and shall have the authority to use the testimony of consultants. The board of appeals shall

adopt rules, not inconsistent with the purposes of this chapter, for the conduct of its business pursuant to this chapter and shall file a copy of said rules with the city or town clerk. The provisions of section eleven of chapter forty A shall apply to all such hearings. The board of appeals shall render a decision, based upon a majority vote of said board, within forty days after the termination of the public hearing and, if favorable to the applicant, shall forthwith issue a comprehensive permit or approval. If said hearing is not convened or a decision is not rendered within the time allowed, unless the time has been extended by mutual agreement between the board and the applicant, the application shall be deemed to have been allowed and the comprehensive permit or approval shall forthwith issue. Any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section seventeen of chapter forty A.